Carrier Foundation *and* District 1199J, National Union of Hospital and Health Care Employees, AFSCME, AFL–CIO. Case 22–CA–17003

April 16, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On August 21, 1992, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

The complaint alleges, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the Act, by giving employee Donna Freeby a negative job evaluation for 1989 because of her union activities. Freeby, who had begun working for the Respondent in September 1985 as a nursing assistant, became a unit secretary under the supervision of Carolyn Schmitt, a nursing care coordinator, in 1986. In 1988, Schmitt gave Freeby a good evaluation.

In March 1989, Freeby initiated the Union's organizing campaign, soliciting authorization cards among the Respondent's nonprofessional employees, and continued to take a leading, highly visible role in the campaign through the December 18, 1989 election. There is no dispute that the Respondent was aware of Freeby's union activities. Indeed, the judge found that the Respondent independently violated Section 8(a)(1) when: (1) Schmitt told Freeby that Schmitt knew what she had been doing after work, and Director of Human Resources Merk ordered Freeby to be off the hospital grounds when her workday ended at 4:30 p.m.; (2) Schmitt required Freeby to get Schmitt's permission before leaving her work area; (3) the Respondent's supervisors closely watched Freeby's activities at work; and (4) the Respondent included in Freeby's 1989 appraisal a statement to the effect that Freeby had been counseled about adhering to the requirement to leave the hospital premises when she finished work. There is no room to doubt that the General Counsel made out a prima facie case with respect to the elements of knowledge and animus.

On December 29, 1989, 11 days after the election, Schmitt wrote an annual performance appraisal for Freeby that downgraded Freeby in substantial part, allegedly for tardiness. Schmitt's 1988 evaluation, on which Freeby received more than double the final score of her 1989 evaluation, had reflected that Freeby had a punctuality problem, but this did not result in a significant deduction of points from her evaluation.

At trial, the General Counsel introduced in evidence nursing department call-in records for 1988 and 1989 that showed Freeby was late 17 times in 1988 but only 8 times in 1989. The Respondent defended on the basis of Schmitt's testimony that, in doing Freeby's evaluations, Schmitt relied on her own record of Freeby's attendance, not the call-in records. According to Schmitt, her records, kept in her own notebook, showed that Freeby was late 15 times in 1989 and only 10 times in 1988. Schmitt's notebook for 1989, which contained Schmitt's recording of the times Freeby was late in 1989, was introduced by the Respondent to corroborate Schmitt's testimony. The Respondent did not, however, introduce a similar notebook for 1988. Schmitt also testified that Schmitt later checked Freeby's sign-in sheets for 1989 and discovered that Freeby had been late 33 times, a number that she then noted on Freeby's 1989 evaluation. Schmitt did not testify as to whether she examined the sign-in sheets for 1988, and the Respondent did not introduce into evidence the actual sign-in sheets either for 1989 or 1988.

The judge found a prima facie case and that Schmitt downgraded Freeby in retaliation for Freeby's activities on behalf of the Union. He noted that the Respondent had not explained why Freeby had received a higher grade in 1988 ''when her lateness problem was more severe'' than in 1989. He thus implicitly relied on Freeby's testimony, as corroborated by the nursing department call-in records, that Freeby had been late more often in 1988 than in 1989.

The Respondent excepts in part on the basis that the judge erred in relying on the nursing department call-in records for 1988 and 1989 because those records reflect only the number of times Freeby called in to say that she was going to be late and not the number of times she was actually late. The Respondent argues that there is thus no credible evidence to refute Schmitt's testimony concerning the number of times Freeby was late in 1988 and 1989.

The Respondent, of course, in the face of the General Counsel's prima facie case, has the burden of proving its defense that Freeby's punctuality deteriorated from 1988 to 1989, thus justifying her downgrading on her 1989 evaluation. To do so, the Respondent must offer reliable evidence not only of Freeby's at-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

tendance record in 1989, but also of Freeby's attendance record in 1988. This the Respondent failed to do.

For a number of reasons, we find Schmitt's testimony, and the Respondent's supporting documentation, to be unreliable. First, while the Respondent introduced Schmitt's 1989 notebook record to corroborate her testimony that Freeby was late 15 times in 1989, no such notebook was introduced for 1988. The only documentary evidence introduced for 1988 was the summary notation by Schmitt on Freeby's 1988 evaluation that she had been late 10 times. Had Schmitt's notebook record for 1988 been introduced, the General Counsel would have had a fair opportunity to cross-examine Schmitt on the consistency of her recordkeeping methodology as between 1988 and 1989, and the judge would have had a detailed, documentary basis for evaluating the accuracy of Schmitt's testimony concerning the lateness figure for 1988.

Second, Schmitt's testimony that the 1989 sign-in sheets showed that Freeby was late 33 times in 1989 actually proves too much, because it calls into serious question the reliability of Schmitt's recorded 15 latenesses for Freeby in 1989. The Respondent, as the party who maintained these records and offered testimony concerning them, has the burden of explaining this significant discrepancy. It has failed to do so.[2]

Third, while the Respondent contends that Schmitt's testimony about the 33 latenesses reflected on the 1989 sign-in sheets is further evidence of Freeby's serious lateness problem in 1989, we are not so persuaded. The Respondent did not introduce into evidence the sign-in sheets either for 1989 or 1988. Thus, we do not know, for example, how late Freeby was on each of these 33 occasions. Was it a minute—an arguably de minimis amount—or an hour? More importantly, perhaps, we do not have the 1988 sign-in sheets, or even any testimony as to what they show with respect to the number of times Freeby signed in late. In the absence of the ''benchmark'' 1988 sign-in sheets, the 1989 sheets do not aid us in making the comparison between 1988 and 1989 that is critical to the disposition of this issue.

[2] While the Respondent contends the nursing department call-in records presented an incomplete picture of Freeby's latenesses, those records reflect that Freeby called in 17 times in 1988, 7 more times than the 10 times Schmitt testified she recorded for Freeby in 1988. When allegedly incomplete records reflect more latenesses than the allegedly accurate records Schmitt kept, this casts additional doubt on the reliability of Schmitt's testimony.

We find that the Respondent has not carried its burden of explaining discrepancies and conflicts in the testimonial and documentary evidence it introduced in its defense, and thus has not demonstrated that Freeby was tardy more often in 1989 than in 1988. Accordingly, we conclude, as did the judge, that the Respondent has not established that it would have downgraded Freeby even in the absence of her union activities.[3] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Carrier Foundation, Belle Meade, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[3] In these circumstances, and construing any ambiguity against the wrongdoer, we agree with the judge that it is appropriate to use the 1988 evaluation for the purpose of determining backpay.

Dorthy C. Karlebach, Esq., for the General Counsel.
Donald A. Romano, Esq. (Carpenter, Bennett & Morrissey), of Newark, New Jersey, for Carrier Foundation.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that Carrier Foundation (the Respondent), in violation of Section 8(a)(1) of the National Labor Relations Act (the Act), maintained an overly broad and vague rule governing access to its property by off-duty employees and applied that rule to an employee, Donna Freeby, discriminatorily for union-related purposes. The complaint further alleges that the Respondent, in violation of Section 8(a)(1) and (3) of the Act, gave Freeby a negative job evaluation in 1989, more closely scrutinized her daily work activities and counseled her for violating its access rule—all because of her activities on behalf of District 1199J, National Union of Hospital and Health Care Employees, AFSCME, AFL–CIO (the Union).

The Respondent, in its answer, denies that it violated the Act and asserts that the allegations are barred by the provisions of Section 10(b) of the Act.

I heard this case in Newark, New Jersey, on December 16 and 17, 1991, and on January 7, 1992. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION—LABOR ORGANIZATION

The Respondent operates a psychiatric hospital in Belle Meade, New Jersey, and meets the Board's standard for asserting jurisdiction over it as a health care institution.

The Union is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Access Rule*

The Respondent has over 500 employees at its facility in Belle Meade, New Jersey. It maintains the following rule, entitled ''Access to Hospital'':

> Off-duty employees are not permitted to enter or remain in Hospital buildings or anywhere on exterior Hospital property where work or normal Hospital operations occur unless granted permission to visit with a patient or participate in organized Hospital activities.

The General Counsel contends that this rule is vague and so broad that it interferes with, restrains, and coerces the Respondent's employees as to their rights under Section 7 of the Act. The Respondent contends that the rule is lawful as it bars off-duty employees from access to areas where work or normal hospital operations occur.

The Board has held that an employer may lawfully promulgate a rule to limit access to employees, who are not on duty, solely to the interior of its facility and to other working areas, so long as the rule is clearly disseminated to all employees, is nondiscriminatory as to employees engaged in union activity, and does not bar entry to parking lots, gates, and other outside nonworking areas unless justified by business reasons. See *Tri-County Medical Centers*, 222 NLRB 1089 (1976). The Board has affirmed a finding that a rule, substantially identical to the one quoted above, was consistent with the guidelines established in *Tri-County* and thus was valid. See *Woodsview Rehabilitation Center*, 265 NLRB 838, 843 (1982). Based on that holding, I find no merit in General Counsel's contention that the quoted rule is facially invalid.

B. *Alleged Discriminatory Limitations on Freeby's use of the Hospital Premises*

The complaint alleges that the Respondent's vice president of human resources, Joseph Merk, and its nursing care coordinator, Carolyn Schmitt, applied the no-access rule to an employee, Donna Freeby, in order to discourage her activities on behalf of the Union in that the Respondent permitted employees access for other than union purposes. The Respondent asserts that this allegation should be dismissed as the incident giving rise to it took place beyond the limitation period set out in Section 10(b) of the Act. As to the merits, the Respondent denies that it discriminated against Freeby. The complaint also alleges, and the Respondent denies, that Freeby's daily work activities were more closely scrutinized in order to discourage her from continuing her support of the Union.

Freeby has worked for the Respondent since September 1985. She began as a nursing assistant. In 1986, she became a unit secretary under the supervision of Carolyn Schmitt, a nursing care coordinator. In 1988, Freeby received a good evaluation from Schmitt and anticipated receiving a wage increase commensurate with it. Instead, because of budgetary considerations, her increase and those given employees similarly rated were limited. In March 1989 Freeby initiated the Union's organizing effort among the Respondent's nonprofessional employees. All dates hereafter are for 1989 unless stated otherwise.

On October 5, Freeby, carrying two large envelopes containing union authorization cards signed by employees, walked alongside the Union's representative at the front of a ''march'' by employees to the Respondent's administration office. There, they were met by the Respondent's labor counsel who, after receiving from them the Union's demand for recognition, advised them to file a petition for an election. A petition was filed. A hearing on that petition was held on November 3. Freeby attended that hearing. The election pursuant to that petition was held on December 18. The Union lost.

The General Counsel offered Freeby's testimony, which was uncontroverted, that in the early part of November, after the Union's recognition demand was made, she was talking with various employees in the Respondent's cafeteria about campaign literature that was distributed to them by the Respondent. She was there from about 4:30 to 8 p.m. A supervisor, Betty Pereau, told her that she would like Freeby to leave and Freeby left. That incident is not alleged as a violation of the Act. It occurred more than 6 months prior to May 16, 1990, the date on which the initial unfair labor practice charge in this case was served on the Respondent.

On Friday, November 3, Freeby had occasion to go to work areas other than her own in order to distribute copies of a notice to employees which advised that they would be visited by a consulting neurologist on Monday, November 6. On the next day, November 7, the Respondent's director of nursing services, Anita Mozzai, issued a memorandum which advised that the nursing office would be handling ''consults.'' In effect, Freeby was thereby relieved of the job of distributing notices as to when consulting physicians would be visiting the various offices. Any allegation that that change in her work duties was violative of the Act would also be time-barred by Section 10(b).

The incident discussed next is alleged as violative and the Respondent has asserted as an affirmative defense that that allegation is also time-barred.

Freeby testified that, in ''mid-November,'' her supervisor, Schmitt, and the Respondent's director of human resources, Joseph Merk, came to her desk shortly before 4:30 p.m. Freeby gave the following account of the discussion then. Schmitt told her that they ''know what [she has] been doing after work and that it has got to stop.'' When she asked what they were referring to, Schmitt replied that she knows what they are talking about. Schmitt then said that Freeby's hours are from 8:30 a.m. to 4:30 p.m. and that she is to be out of there at 4:30 p.m. When Freeby commented that it usually takes her fifteen minutes after quitting time of 4:30 p.m. before she is ready to leave, Merk told her ''to be off the grounds at 4:30 p.m.'' Merk further stated that she was ''not to go off her unit [for whatever reason] without Schmitt's permission.'' Freeby then stated that she guesses that she has to have permission to go down the hall to mail a note-a-gram

(a note-a-gram is an interoffice form used to request time off, for a vacation, or to apply for a posted job opening, or whatever). Schmitt offered to mail it. When Freeby declined the offer, Schmitt said that she would accompany her. Merk said that would be fine and that Schmitt would go with her. Merk left. Shortly after that, Freeby walked down the hall to mail the note-a-gram. Schmitt ''ran after'' her. Schmitt told her that she was making a fool of herself. Freeby replied that Schmitt was the one who was making a fool of herself by chasing her down the hall. Schmitt followed Freeby until she got her coat and purse and left.

On the following day, according to Freeby, she received a telephone call at exactly 4:30 p.m. from the director of nursing services who told her then that she had dialed the wrong number. At that same time, three of the Respondent's vice presidents were standing outside her office. They stayed there while she gathered her belongings and left.

The Respondent contends that the incident referred to in Freeby's account occurred on November 9, a date more than 6 months prior to the service of the initial unfair labor practice charge on the Respondent. It bases this contention on the testimony of Schmitt and a note-a-gram it placed in evidence. The Respondent's counsel asked Schmitt a series of questions directed to the following point—as to whether the note-a-gram was the only one for the month of November, that she had found in a box or a file which was kept for each employee in the nursing office. Schmitt's reply to each of those questions was in the affirmative. The note-a-gram in evidence was signed by Freeby and was date-stamped, ''1989 Nov—9 PM 4:36.''

Freeby testified, in rebuttal, that she has filed dozens of note-a-grams. Schmitt acknowledged, during her cross-examination, that she could not be certain that Freeby had filed only one note-a-gram in November.

The Respondent has the burden of proving that the incident, alleged as violative, took place more than 6 months before the filing and service of the unfair labor practice charge. *Hi-Lo Foods*, 247 NLRB 1079, 1087 (1980).

The evidence proffered by the Respondent to establish that the discussion among Freeby, Schmitt and Merk took place prior to the start of the 10(b) period is not persuasive. The questions put to Schmitt were leading, her answers were simply affirmations, and it is unclear as to how note-a-grams are processed or as to how orderly any recordkeeping system thereon is. In weighing all the evidence, I find that the Respondent has not met its burden of proof. In that regard, see *St. Mary's Infant Home*, 258 NLRB 1024 fn. 3 (1981). See also *Knapp Foods*, supra.

The Respondent disputes Freeby's account of the discussion she had with Schmitt and Merk. Schmitt's account of that discussion is as follows. As the area where Freeby worked was overcrowded due to renovations being made, she told Freeby that she wanted her to leave when she finished work at 4:30 p.m. She thinks she explained to Freeby then that she had to leave because of the overcrowded conditions. She does not remember the exact details but she knows that she said that to Freeby. Freeby then said she had to mail a note-a-gram. Freeby did not want to give it to her to mail. In telling Freeby about leaving the work area, she is pretty sure that she told her, as she had done on other occasions, that she (Freeby) could take a minute or two to use the restroom. She (Schmitt) did not walk after Freeby down the 75- to 100-foot walkway when Freeby left to mail the note-a-gram. Schmitt answered in the negative when the Respondent's counsel asked her if Merk had told Freeby to be off the grounds by 4:30 p.m. and when he asked if Freeby was told that she had to get Schmitt's permission before leaving her work area.

Merk testified that Schmitt told Freeby that she would like her to be out of her work area at 4:30 p.m. as her work hours were from 8:30 a.m. to 4:30 p.m. and as the area was too crowded. Merk answered in the negative in response to questions as to whether Freeby was told to be out of the building, or was told to be off the grounds, or had to get Schmitt's permission to leave her work area.

Schmitt, some time later, wrote on Freeby's job performance evaluation form, that she had counseled Freeby ''about leaving the hospital premises in a timely manner when her work day is completed.''

I credit Freeby's account. Schmitt's reference in Freeby's job evaluation form to having to talk to her about leaving the hospital premises supports Freeby's account that she was told to be off the grounds and does not support the account of Schmitt or that of Merk that she was asked to leave her work area. Further, the summary denials by Schmitt and Merk that Freeby was told to get permission before leaving her work area can be accorded little weight against the candid, detailed testimony given by Freeby.

The record establishes, and I find, that Freeby actively solicited support for the Union among the Respondent's employees, that the Respondent was fully aware of her union activities and that Schmitt was alluding to those activities when Merk told Freeby to be off the hospital grounds when her workday ended. This restriction was unlawfully designed to inhibit Freeby from promoting the interests of the Union among the Respondent's employees. See *Hickory Creek Nursing Home*, 295 NLRB 1144, 1149 (1989). The requirement that Freeby must get Schmitt's permission before leaving her work area was motivated by the same unlawful consideration. See *Heads & Threads Co.*, 261 NLRB 800, 809 (1982). The close watch put on Freeby that day when Schmitt trailed her down the hallway and the events of the following day when Freeby was finishing her workday also were unlawfully aimed at discouraging her from talking to employees about the Union. See *Peavey Co.*, 249 NLRB 853, 857–858 (1980).

The Respondent's brief states that the General Counsel apparently contends that another rule, a no-solicitation rule, was being discriminatorily applied to Freeby. Its brief asserts, in effect, that the evidence does not support such a contention. Those observations, along with the testimony adduced by the General Counsel that employees were permitted to sell cakes and to solicit for charitable causes while at the hospital, obfuscate the clear issues—whether Freeby was told to get off the grounds at 4:30 p.m., or was told to get Schmitt's permission if she wanted to leave her work area, or was followed, and whether the Respondent was discriminatorily motivated thereon. Those matters turn on credibility, as discussed above.

C. *Freeby's Job Performance Evaluation*

The complaint alleges that the Respondent gave Freeby a negative job evaluation for 1989 because of her union activities.

The evaluation was prepared by Schmitt on a form entitled, annual performance appraisal, which refers to an attachment, entitled ''job description.'' The appraisal form lists factors on which an employee is to be rated—attendance, punctuality, conforms to dress code, ability to work with others, and willingness to consider suggestions. The job description form lists 22 ''Duties and Responsibilities'' to be rated ranging from ''Assists efficiently in the overall functioning of unit by acting as receptionist and organizing and performing clerical duties'' to ''Performs other duties willingly as requested.''

The 22 items on the job description form are the first matters to be evaluated. As to each, one of three marks is made alongside. A plus mark is worth 3 points, a check mark is worth 1.5 points, a minus mark is zero. The total is then averaged by dividing it by 22. Freeby received, on the 1989 job description form, 11 plus marks, 6 checks, and 2 minus marks—a total of 45 points, resulted in a 2.0 average. From the job description average, deductions are made for each of the factors on the annual performance appraisal form on which an ''x'' is marked under the category, ''Needs Improvement.'' Of the six factors on Freeby's 1989 appraisal, three were checked as ''Needs Improvement''; deductions therefor totaled 0.7. That amount was subtracted from her job description rating of 2.0, giving her a final score of 1.3.

For 1988, her final score was 2.6. Of the then 20 items on the 1988 job description form, she received 17 plus marks and 3 checkmarks, giving her a 2.8 average. On her annual appraisal form, only 0.2 was deducted because she had a problem with punctuality.

The Respondent asserts that Freeby received a final score in 1989, lower than that for 1988, because of her problem with punctuality and because she had called Schmitt a liar and a fool many times. On Freeby's 1989 appraisal, Schmitt noted that her own records show that Freeby was late 15 times in 1989 and that the more stringent records kept by the payroll department reflected that Freeby actually was late 33 times[1] whereas, according to Schmitt, Freeby had been late only 10 times in 1988. The payroll records in evidence, however, confirm Freeby's testimony that she was late less often in 1989 than in 1988. Those records show that, in 1988, she was late 17 times and only 8 times in 1989.[2]

Schmitt testified that she downgraded Freeby in 1989 because of her tardiness problem. Thus, for the item ''working cooperatively with staff and team members,'' Freeby was downgraded from her rating thereon in 1988, according to Schmitt, because of her lateness problems in 1989. Schmitt's rationale was that, as Freeby was late often, she was not working cooperatively. No explanation was proffered as to why Freeby received a higher grade on that item in 1988, when her lateness problem was more severe. Rather, Schmitt asserts that she based her determination on the lateness records she maintained herself, and not on the records of the payroll department. I am unable to accept that rationale as the annual performance appraisal form makes provision for deducting points for punctuality problems. The assessment of a lateness penalty on that form and then assessing many other penalties on the job description form for the same lateness and on items which address other specific work considerations strike me as needlessly duplicative. The proffered explanation is implausible. It is even more so when, in 1988, no such double penalties were assessed.

Schmitt offered a separate explanation for having downgraded Freeby from 1988 as to several items on the job description form. She testified that she downgraded Freeby's appraisal because Freeby called her a liar shortly after she had held a meeting with her staff at which she told the employees that the Union was making anonymous phone threats to her at home. Schmitt also testified that Freeby called her a fool and a liar about 25 times and that disclosed to her an attitude on Freeby's part that warranted downgrading certain items on her job description form. She testified further that she did not warn Freeby about such conduct.

Freeby, as noted above, had responded to Schmitt's calling her a fool (when Schmitt followed her while she was mailing note-a-gram) by saying that Schmitt was the one who was acting like a fool by following her. Freeby also testified that, after the meeting in which Schmitt blamed the Union for anonymous phone threats, she met with Schmitt privately to tell her that she, Freeby, is in charge of the Union's campaign, that the Union did not telephone Schmitt and that she (Freeby) doubts that Schmitt ever got any such telephone calls. When Schmitt asked, according to Freeby, if Freeby was calling her a liar, Freeby responded that she had not called her a liar but that she (Freeby) did not believe that Schmitt had received threatening phone calls. It is highly unlikely that Freeby would have called Schmitt a liar and a fool 25 times. It is improbable that she did so with virtual impunity until appraisal time. I do not credit Schmitt's explanations.

The downgrading in 1989, I find, was in retaliation for Freeby's concerted activities on behalf of the Union.[3] I further find, as alleged in the complaint, that the statement in Freeby's appraisal that she was counseled about adhering to the requirement to leave the hospital premises when she finishes work was aimed at discouraging her union activities.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[1] The Respondent, in its brief, states that Freeby's testimony confirmed that she was late 33 times 1989. The testimony it refers to obviously pertains to Freeby's comprehension of what Schmitt had told her when she ''questioned the tardiness reflected on'' the appraisal. In that context, Freeby's testimony is not an admission against interest. If Freeby had so readily conceded that she was late that many times in 1989, I likely would have received a stipulation thereon and not conflicting accounts as proffered by the parties.

[2] As background to show union animus, the General Counsel offered testimony that, when Freeby began organizing for the Union in 1989, the Respondent's director of internal medicine was aware of her activity. General Counsel contends that she was then given several warnings about her tardiness, notwithstanding that, in her prior years in the Respondent's employ, she received excellent annual appraisals despite a history of being late often. The Respondent asserts that the warnings issued in 1989 were in response to an escalating problem. It is unnecessary to decide the merits of these conflicting views.

[3] Were it necessary to do so, I would further find that Schmitt's penalizing Freeby because Freeby challenged Schmitt's statement to the staff that the Union had threatened her was a direct admission by the Respondent that Freeby was penalized because of her union activities.

2. The Union is a labor organization defined in Section 2(5) of the Act.

3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by having instructed its employee, Donna Freeby, in order to discourage her from supporting the Union, to leave its premises upon completion of her workday and by the conduct described in the next paragraph.

4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act by having given Donna Freeby a negative annual performance appraisal for 1989, by requiring her to get her supervisor's permission to leave her work area, by having her supervisor follow her about the premises and by counseling her to leave its premises—all in order to discourage her from supporting the Union.

5. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent did not engage in any other unfair labor practice alleged in the complaint.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

The Respondent contends that no remedial order should issue as to Donna Freeby's having been unlawfully given a negative evaluation for 1989, as it asserts that any monetary remedy thereon would in effect be de minimis. The violation, however, is not de minimis. See *Regency at the Rodeway Inn*, 255 NLRB 961 (1981). Freeby's evaluation for 1989 should correspond to that given her in 1988 insofar as the marks on the job description items are concerned and the average thereof should be reduced by 0.2, the same amount allotted in 1988 as to punctuality. If the resultant final score calls for a higher wage increase than the one given her then, she should be made whole thereon with interest in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Carrier Foundation, Belle Meade, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees to leave its premises, in order to discourage them from supporting District 1199J, National Union of Hospital and Health Care Employees, AFSCME, AFL–CIO (the Union).

(b) Giving employees negative annual performance appraisals to discourage support for the Union.

(c) Requiring employees, in order to discourage support for the Union, to get their supervisor's permission to leave their work area.

(d) Having employees followed about their work area to discourage them from supporting the Union.

(e) Counseling employees that they are to leave the premises in order to discourage union activity.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Revise Donna Freeby's 1989 annual performance appraisal and make her whole, with interest, for any loss of pay she suffered by reason of the unlawful appraisal given her then, in accordance with the provisions of the remedy section above.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts owing under the terms of this Order.

(c) Post at its Belle Meade, New Jersey, copies of the attached notice marked ''Appendix.''[5] Copies of the notice on forms to be provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places at these locations, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice and abide by its provisions.

WE WILL NOT tell our employees to leave our premises in order to discourage them from supporting District 1199J, National Union of Hospital and Health Care Employees, AFSCME, AFL–CIO (the Union).

WE WILL NOT give employees negative annual performance appraisals to discourage support for the Union.

WE WILL NOT require employees to get their supervisor's permission to leave their work area, when done to discourage support for the Union.

WE WILL NOT have employees followed about their work area to discourage them from supporting the Union.

WE WILL NOT counsel employees that they are to leave the premises, when done to discourage union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL revise Donna Freeby's 1989 annual performance appraisal, on a nondiscriminatory basis and make her whole, with interest, for any wages lost as a result of our having issued that appraisal to discourage her from supporting the Union.

CARRIER FOUNDATION